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# Willis v. Wal-Mart: Same-Sex Sexual Harassment is a Recognized Claim in West Virginia

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# ***WILLIS V. WAL-MART: SAME-SEX SEXUAL HARASSMENT IS A RECOGNIZED CLAIM IN WEST VIRGINIA***

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## **I. INTRODUCTION**

In *Willis v. Wal-Mart*,<sup>1</sup> the West Virginia Supreme Court of Appeals was presented with a certified question of first impression: “Does the . . . [West Virginia Human Rights Act (“Act”)] recognize a cause of action for a claim of same-gender sexual harassment and, if so, what are the elements of the claim?”<sup>2</sup> The court concluded that discrimination based upon same-gender sexual harassment is a recognized cause of action under the Act. Moreover, the court

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<sup>1</sup> 504 S.E.2d 648 (W. Va. 1998).

<sup>2</sup> *Id.* at 650.

determined that the elements of a same-gender sexual harassment claim are the same as the elements set forth for an opposite-gender sexual harassment claim.<sup>3</sup> The court's answers to the certified questions mirror the law announced in *Oncale v. Sundowners Offshore Service*,<sup>4</sup> in which the United States Supreme Court determined that same-sex harassment is actionable under Title VII.<sup>5</sup> Title VII of the Civil Rights Act of 1964<sup>6</sup> states in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>7</sup> While West Virginia had, prior to *Willis*, never faced the question of same-sex sexual harassment,<sup>8</sup> other state and federal courts have taken a "bewildering variety of stances" concerning same-sex harassment.<sup>9</sup> With the *Willis* decision, West Virginia quickly falls into step with the recent United States Supreme Court ruling.<sup>10</sup>

With *Willis* holding that the West Virginia Human Rights Act recognizes a claim of same-sex sexual harassment, a new controversy may arise as to what exactly constitutes sexual harassment. Although the *Willis* Court stressed that the opinion would not open the courthouse doors to all employees who feel that they have been subjected to offensive behavior or language, increased litigation is sure to follow the *Willis* decision.<sup>11</sup>

This Case Comment considers the jurisprudence of sexual harassment statutes, focusing on the claim behind same-sex sexual harassment. It reviews the facts of *Willis* and the Supreme Court of Appeals' reasoning for recognizing a claim of same-sex sexual harassment under the West Virginia Human Rights Act.

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<sup>3</sup> See *id.* at 653.

<sup>4</sup> 118 S. Ct. 998 (1998).

<sup>5</sup> Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1) (1994).

<sup>6</sup> Title VII flatly and broadly prohibits "discrimination against any individual . . . because of such individual's . . . sex." See 42 U.S.C. § 2000e-2(a)(1) (1994). Because Congress intended that the term "sex" in Title VII to mean simply "man" or "woman," there is no need to distinguish between the terms "sex" and "gender" in Title VII cases. Hence, courts speaking in the context of Title VII, have used the terms "sex" and "gender" interchangeably to refer simply to the fact that an employee is male or female. Therefore, the term "sex" in the statute is synonymous with "gender." See *Hopkins v. Baltimore Gas and Electric Company*, 77 F.3d 745 (4<sup>th</sup> Cir. 1996).

<sup>7</sup> *Oncale*, 118 S. Ct. at 1001.

<sup>8</sup> See *Willis*, 504 S.E.2d at 649.

<sup>9</sup> *Oncale*, 118 S. Ct. at 1002.

<sup>10</sup> See *Willis*, 504 S.E.2d at 649.

<sup>11</sup> See *id.* at 653.

Moreover, this Comment examines the inconsistencies of previous holdings in same-sex sexual harassment claims and gives a hypothesis as to the future impact of the *Willis* decision in sexual harassment suits.

## II. STATEMENT OF THE CASE

From approximately April 1992 until February 1996, the plaintiff, Christopher Lack, worked for WAL-MART at its Beckley, West Virginia location.<sup>12</sup> Lack claimed that his supervisor, James Bragg, made offensive jokes, remarks, and gestures to him or in his presence between October 1994 and April 1995.<sup>13</sup> For instance, Lack alleged that Bragg, while grabbing his crotch at a department Christmas party in December 1994, said, "This is your Christmas present."<sup>14</sup> On one occasion, when Lack indicated that he was no longer working, Bragg stated, "Good, I'm off the clock, too," and motioned as if he were going to unzip his pants while saying, "Come here."<sup>15</sup> Also, when Lack called Bragg to the service desk, Bragg reportedly would often say, "I'm coming, I'm coming, Chrissy. I'm coming for you."<sup>16</sup> On two occasions, Lack decided that Bragg was making homosexual advances toward him when Bragg grabbed his own crotch and then motioned as if he were going to unzip his pants.<sup>17</sup>

Lack filed an internal complaint of sexual harassment with WAL-MART.<sup>18</sup> After WAL-MART investigated the alleged harassing incidents made by Bragg, WAL-MART determined that Bragg had engaged in conduct that offended some of WAL-MART's female employees, and WAL-MART terminated Bragg's employment.<sup>19</sup>

One of the females that Bragg allegedly harassed, Susan Willis, and Christopher Lack filed a civil action in the Raleigh County Circuit Court against WAL-MART Stores Inc. under the West Virginia Human Rights Act, chapter fifty-five, article 7, section 5 of the West Virginia Code, which allows for an action for

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<sup>12</sup> See *id.* at 650.

<sup>13</sup> See *id.*

<sup>14</sup> *Id.* at 650 n.7.

<sup>15</sup> *Willis*, 504 S.E.2d at 650 n.7.

<sup>16</sup> *Id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 650.

<sup>19</sup> See *id.*

discrimination predicated on sexual harassment.<sup>20</sup> The defendants filed a motion for summary judgment contending that the Act does not recognize a claim for same-sex sexual harassment.<sup>21</sup>

By an order dated June 5, 1997, the Circuit Court of Raleigh County certified the following questions to the West Virginia Supreme Court of Appeals: "Does the . . . [West Virginia Human Rights Act] recognize a claim of same-gender sexual harassment and, if so, what are the elements of the claim?"<sup>22</sup> The West Virginia Supreme Court of Appeals answered the first half of the certified question by finding that discrimination based upon same-sex sexual harassment is a recognized cause of action under the Act.<sup>23</sup> The court answered the second half of the certified question by finding that the elements to establish a claim of same-sex harassment are the same required to establish a claim for opposite-sex sexual harassment.<sup>24</sup>

### III. LEGAL BACKGROUND OF SEXUAL HARASSMENT CLAIMS

Recently, the West Virginia Supreme Court of Appeals held that when interpreting provisions of the West Virginia Human Rights Act the court will look to Title VII of the Civil Rights Act of 1964 for guidance.<sup>25</sup> Title VII of the Civil Rights Act of 1964, Section 703(a), forbids "an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>26</sup>

The provision against discrimination based on sex was not included in Title VII until the final minutes of debate on the floor of the House of Representatives.<sup>27</sup> The main criticism in opposition to adding discrimination based on sex to Title VII was that sex discrimination was so unlike other types of

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<sup>20</sup> See *Willis*, 504 S.E.2d at 650.

<sup>21</sup> See *id.*

<sup>22</sup> *Id.*

<sup>23</sup> See *id.* at 649-50.

<sup>24</sup> See *id.* at 653.

<sup>25</sup> See *Willis*, 504 S.E.2d at 652 (citing *West Virginia Human Rights Comm'n v. Wilson Estates*, No. 24142, 1998 WL 248638 (W. Va. May 18, 1998)).

<sup>26</sup> Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1) (1994).

<sup>27</sup> See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63 (1986).

discrimination that a separate legislative enactment was warranted.<sup>28</sup> The criticism was overlooked, and the bill was passed as amended.<sup>29</sup> The courts were left with little legislative history to guide interpretation of the Title VII's prohibition of sex discrimination.<sup>30</sup>

A. *What Effect Must Conduct Have to Constitute Sexual Harassment?*

Without any clear legislative intent behind the sex discrimination element of Title VII, it was unclear what types of harm Title VII was intended to address.<sup>31</sup> Clearly, when a supervisor harasses an employee because of the employee's sex, that supervisor is discriminating on the basis of sex.<sup>32</sup> For this reason courts assumed, quite reasonably, that *quid pro quo* harassment was explicitly discriminatory with respect to terms or conditions of employment.<sup>33</sup> *Quid pro quo* harassment occurs when an employer demands sexual favors from an employee in return for a job benefit.<sup>34</sup> However, it was less clear whether an employer's sexually demeaning behavior altered terms or conditions of employment in violation of Title VII if concrete job benefits were not affected.<sup>35</sup> For instance, the language of Title VII that prohibits discrimination as to "compensation, terms, conditions, or privileges" of employment seemed to imply that Congress was interested in only tangible or economic loss that an employee may suffer as a result of sexual discrimination.<sup>36</sup> In order to leave no room for further speculation, Justice Rehnquist, writing for the Court, announced in *Meritor Savings Bank v. Vinson* that Congress was not merely concerned with "tangible loss" of "an economic character"<sup>37</sup> when drafting Title VII. Instead, Congress had intended to include the psychological aspects of the workplace environment to "strike at the entire

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<sup>28</sup> See *id.* at 63-64.

<sup>29</sup> See *id.* at 64.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

<sup>32</sup> See *Meritor*, 477 U.S. at 64.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> *Id.* (quoting *Los Angeles Dept. of Water & Power v. Mankart*, 435 U.S. 702 (1978)(citations omitted)).

<sup>37</sup> *Meritor*, 477 U.S. at 64.

spectrum of disparate treatment of men and women in employment.”<sup>38</sup>

In *Meritor*, the plaintiff was hired by the Vice President of Meritor Savings Bank, Sidney Taylor.<sup>39</sup> The plaintiff testified that during her probationary period as a teller-trainee, Taylor treated her in a paternal way and did not make any sexual advances towards her.<sup>40</sup> However, once she became a teller, Taylor invited the plaintiff “out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations.”<sup>41</sup> Eventually, the plaintiff agreed.<sup>42</sup> Thereafter, Taylor made repeated demands upon the plaintiff for sexual favors, usually at the branch, both during and after business hours.<sup>43</sup> The plaintiff estimated that over the next several years she had intercourse with Taylor some 40 or 50 times.<sup>44</sup> In addition, the plaintiff stated that “Taylor fondled her in front of other employees, followed her into the women’s restroom when she went there alone, exposed himself to her, and even forcibly raped the plaintiff on several occasions.”<sup>45</sup>

To formulate a standard of harassment, the Court looked to the 1980 Equal Employment Opportunity Commission Guidelines.<sup>46</sup> The Guidelines upheld the view that harassment not resulting in “tangible loss” of “an economic character” can violate Title VII.<sup>47</sup> The Guidelines list conduct that may qualify as discrimination under Title VII: unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.<sup>48</sup> Relevant to the facts of *Meritor*, the Guidelines provide that the listed forms of sexual misconduct may establish a claim under Title VII, whether or not directly linked to the grant or denial of an economic *quid pro quo*, if such sexual misconduct has the purpose or effect of unreasonably interfering with an employee’s work performance or creating an intimidating, hostile, or offensive working environment.<sup>49</sup> The Court

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<sup>38</sup> *Id.*

<sup>39</sup> *See id.* at 59.

<sup>40</sup> *See id.* at 60.

<sup>41</sup> *Id.*

<sup>42</sup> *See Meritor*, 477 U.S. at 60.

<sup>43</sup> *See id.*

<sup>44</sup> *See id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See id.* at 65.

<sup>47</sup> *Meritor*, 477 U.S. at 65.

<sup>48</sup> *See id.* (citing 29 C.F.R. § 1604.11(a) (1985)).

<sup>49</sup> *See id.* (citing 29 C.F.R. § 1604.11(a)(3) (1985)).

endorsed the stance taken by the EEOC by holding in *Meritor* that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.<sup>50</sup>

*B. What is a Hostile or Abusive Work Environment?*

While the *Meritor* Court held that a plaintiff may establish a claim under Title VII by showing that discrimination based on sex has created a hostile or abusive work environment, the Court failed to explain exactly what constitutes a hostile work environment.<sup>51</sup> The Circuit Courts began erroneously interpreting the abhorrent facts in *Meritor* as the minimum threshold required to ring the bell of sexual harassment.<sup>52</sup> To settle the conflict among the Circuits on whether conduct, to be actionable as “abusive work environment” harassment, must “seriously affect an employee’s psychological well-being” or lead the plaintiff to “suffer injury,” the Supreme Court again examined the scope of Title VII as pertaining to discrimination based on sex in *Harris v. Forklift Systems, Inc.*<sup>53</sup>

In *Harris*, a woman brought an action against her employer claiming her manager constantly insulted her because of her gender and often made her the target of unwanted sexual innuendoes.<sup>54</sup> The United States District Court for the Middle District of Tennessee followed Circuit precedent by holding that while the Manager’s conduct would offend the reasonable woman, it was not so severe as to be expected to affect seriously the psychological well-being of the plaintiff.<sup>55</sup> The District Court went on to add that while a woman manager under like circumstances would have been offended by the manager’s conduct, the conduct did not rise to the level of interfering with that person’s work performance, nor was the conduct so severe that it subjectively offended this plaintiff to the point of injury.<sup>56</sup>

In reversing the District Court, the Supreme Court reaffirmed the *Meritor* standard and refined its limits.<sup>57</sup> Justice O’Connor, writing for the Court, reasoned

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<sup>50</sup> See *id.* (citing 29 C.F.R. § 1604.11(a)(3) (1985)).

<sup>51</sup> See generally *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

<sup>52</sup> See *id.* at 20 (comparing *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6<sup>th</sup> Cir. 1986)).

<sup>53</sup> *Id.*

<sup>54</sup> See *id.* at 19.

<sup>55</sup> See *id.* at 20.

<sup>56</sup> See *Harris*, 510 U.S. at 20.

<sup>57</sup> See *id.* at 22.



that a discriminatory work environment, although not psychologically affecting the employees, can and often will still affect employees' job performance, discourage employees from remaining at their job, or keep them from advancing in their employment.<sup>58</sup> Therefore, while the egregious conduct presented in *Meritor* presents an especially appalling example of harassment that would seriously affect the reasonable person's psychological well-being, discriminatory conduct does not need to be psychologically injurious to establish a claim under Title VII.<sup>59</sup>

Admittedly, even with the more clearer standard provided by *Harris*, no bright line test exists to determine whether a work environment is hostile or abusive.<sup>60</sup> However, it is clear that, when determining whether a work environment is hostile or abusive, a court must consider all circumstances of the situation.<sup>61</sup> This consideration may include factors such as the following: (1) frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance.<sup>62</sup>

Title VII has not, and likely will not, become a general civility code because of the difficulty of showing that an environment has become "hostile" or "abusive." The standard that a plaintiff must meet is quite strict because it contains both objective and subjective elements. The environment must be one that both a reasonable person would find hostile or abusive and also one that the plaintiff actually did find hostile and abusive.<sup>63</sup> Additionally, the plaintiff must be able to prove that the abuse occurred because of the plaintiff's sex.<sup>64</sup> Title VII is not meant to guard against complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing."<sup>65</sup> Stated differently, only very extreme conduct can be said to alter the terms and conditions of employment.<sup>66</sup> The Seventh Circuit phrased the standard best, holding that the inquiry must be balanced in terms of a line that separates the

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<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

<sup>60</sup> See *id.* at 23.

<sup>61</sup> See *Harris*, 510 U.S. at 23.

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> See *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp.2d 870, 877 (N.D. Ind. 1998) (citing *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998)).

<sup>65</sup> *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2284 (1998) (citations omitted).

<sup>66</sup> See *Baskerville v. Culligan International Co.*, 50 F.3d 428, 430 (7<sup>th</sup> Cir. 1995).

merely vulgar and mildly offensive from the deeply offensive and sexually harassing.<sup>67</sup> Judge Posner stated the dilemma:

On one side of the line lies sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.<sup>68</sup>

### C. Vicarious Liability

The difference between *quid pro quo* harassment claims and hostile environment claims, as relevant to an employer's liability for an employee's discrimination, was not amply discussed in *Meritor*.<sup>69</sup> As to this issue, *Meritor* held, with no further explanation, that agency principles were to control.<sup>70</sup> Yet, as these terms provided by *Meritor* began to be used freely by other courts, the terms gained an entirely new significance.<sup>71</sup> Courts were determining employer liability based on the type of harassment claim brought by the plaintiff.<sup>72</sup> Only if the plaintiff could establish a *quid pro quo* claim would the employer be vicariously liable.<sup>73</sup> This determination forced plaintiffs to fit their claim, no matter the facts, into the mold of a *quid pro quo* claim.<sup>74</sup> Therefore, the definition of *quid pro quo* sexual harassment broadened considerably.<sup>75</sup>

The U. S. Supreme Court in *Burlington Industries, Inc. v. Ellerth* removed the impetus to file strained *quid pro quo* claims by holding that an employer is subject to vicarious liability for an actionable environment created by any

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<sup>67</sup> See *id.* at 431.

<sup>68</sup> *Id.* at 430.

<sup>69</sup> See *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2264 (1998).

<sup>70</sup> See *id.* (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)).

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See *id.* at 2265.

<sup>74</sup> See *Burlington*, 118 S. Ct. at 2265.

<sup>75</sup> See *id.*

supervisor with authority over the employee.<sup>76</sup> In *Burlington*, a woman quit her job, allegedly because she had been subjected to constant sexual harassment by one of her supervisors.<sup>77</sup> Besides continuous boorish and offensive remarks and gestures made by the supervisor, the woman alleged three incidents where her supervisor's comments could be construed as threats to deny her tangible job benefits.<sup>78</sup> While the Court did expand the employer's vicarious liability beyond *quid pro quo* situations, it allowed the employer two affirmative defenses when no tangible employment action is claimed by the plaintiff: (1) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid the harm.<sup>79</sup> The Court elaborated on the above defenses in *Faragher v. City of Boca Raton*,<sup>80</sup> which was decided the same day as *Burlington*. The *Faragher* Court explained that proof that an employer had promulgated an anti-harassment policy and a complaint procedure is not necessary in every instance.<sup>81</sup> The need or lack thereof for such a policy may be addressed in cases litigating the first enumerated defense.<sup>82</sup> Additionally, *Faragher* explained that the second affirmative defense is not limited to showing an unreasonable failure by the employee to use any complaint procedure provided by the employer; however, a demonstration of such a failure will normally suffice to satisfy the employer's burden of proof under the second element of the defense.<sup>83</sup> While *Faragher* did broaden the scope of the affirmative defenses available to employers, the Court held that no affirmative defense is available when the supervisor's harassment culminates in a tangible employment action.<sup>84</sup> A tangible employment action is defined in *Burlington* as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.<sup>85</sup> In

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<sup>76</sup> See *id.* at 2270.

<sup>77</sup> See *id.* at 2263.

<sup>78</sup> See *id.* at 2262.

<sup>79</sup> See *Burlington*, 118 S. Ct. at 2270.

<sup>80</sup> See generally *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

<sup>81</sup> See *id.* at 2279.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

<sup>85</sup> See *Burlington*, 118 S. Ct. at 2268.

sum, even with the available affirmative defenses, employer liability is much broader after *Burlington* and *Faragher* than it was before them.

#### IV. HISTORY OF SAME-GENDER SEXUAL HARASSMENT

The 1998 U.S. Supreme Court decision in *Oncale*, which was strictly followed in *Willis*, was desperately needed. Almost thirty-five years after Title VII was passed, courts were still having problems with whom the Act protects and with what behaviors the Act protects against. While courts ruled fairly early that Title VII's prohibition of discrimination based on sex protects men as well as women, courts had an obvious problem determining whether members of one group could claim discrimination by members of their own discernable group.<sup>86</sup>

Courts were generally open to acknowledging employer discrimination against a member of the same "group" in the context of racial discrimination in the workplace.<sup>87</sup> The Supreme Court in *Castaneda v. Partida*<sup>88</sup> quickly rejected any conclusive presumption that an employer will not discriminate against members of the same race, and the Court found this reasoning was just as applicable to members of the same sex.<sup>89</sup> In *Castaneda*, the Court held that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group."<sup>90</sup>

Also, courts have had little trouble ruling in cases like *Johnson v. Transportation Agency*,<sup>91</sup> where an employee claims to have been passed over for a job or promotion. In *Johnson*, a male employee with a higher test score than his female co-worker was passed over for a promotion in favor of the female employee.<sup>92</sup> The male employee brought a claim against his employer, claiming that his employer discriminated against him because of his sex by preferring the female employee for promotion.<sup>93</sup> Although the Court dismissed the claim on other grounds, the Court held that the fact the supervisor was also a man was irrelevant

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<sup>86</sup> See *Oncale v. Sundowners Offshore Service*, 118 S. Ct. 998, 1000 (1998).

<sup>87</sup> See *id.*

<sup>88</sup> 430 U.S. 482 (1977).

<sup>89</sup> See *id.* at 499.

<sup>90</sup> *Id.*

<sup>91</sup> 480 U.S. 616 (1987).

<sup>92</sup> See *Oncale*, 118 S. Ct. at 1001 (citing *Transp. Agency, Santa Clara Cty.*, 480 U.S. at 616).

<sup>93</sup> See *id.*

when determining whether or not there had been discrimination.<sup>94</sup>

While courts have acknowledged same-sex harassment where there has been a tangible loss, state and federal courts have taken a bewildering variety of stances in the context of a “hostile environment” same-sex harassment claim.<sup>95</sup> These holdings seem very odd considering that Title VII on its face makes no distinction between men and women, either as the person harassing someone or as the person being harassed, and considering that the EEOC describes sexual harassment in gender-neutral terms.<sup>96</sup> Furthermore, the Supreme Court, in interpreting Title VII, has never ruled or indicated that only women may bring sexual harassment claims or that men may do so only when they are harassed by women.<sup>97</sup>

*A. The View that Same-Sex Sexual Harassment Claims are not Recognized Under Title VII*

The EEOC guideline at issue states:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.<sup>98</sup>

Nevertheless, a minority of courts decided that a man harassed by another man has no claim under Title VII, regardless of the facts in the case.<sup>99</sup> The Fifth Circuit in *Garcia v. Elf Atochem* is the only appellate court to hold that harassment by a male supervisor against a male subordinate never states a claim under Title

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<sup>94</sup> See *id.* (citing *Transp. Agency, Santa Clara Cty.*, 480 U.S. at 624-25).

<sup>95</sup> See *id.*

<sup>96</sup> See generally *Doe v. Belleville*, 119 F.3d 563 (7<sup>th</sup> Cir. 1997).

<sup>97</sup> See *id.*

<sup>98</sup> 29 C.F.R. § 1604.11 (a) (1996).

<sup>99</sup> See generally *Garcia v. Elf Atochem North America*, 28 F.3d. 446 (5<sup>th</sup> Cir. 1994).

VII even though the harassment has sexual overtones.<sup>100</sup> Unfortunately, *Garcia* is very ambiguous about the reasons for its holding: "Harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination."<sup>101</sup> However, the Fifth Circuit did endorse Judge Williams' opinion in *Goluszek v. H.P. Smith*,<sup>102</sup> which is the leading case in this school of thought.

In *Goluszek*, the plaintiff had never been married, nor had he ever lived anywhere but in his mother's home.<sup>103</sup> The plaintiff's psychiatrist described the plaintiff as coming from an "unsophisticated background" and as having led an isolated life with "little or no sexual experience."<sup>104</sup> Also, the plaintiff's psychiatrist said that the plaintiff "'blushes easily' and is abnormally sensitive to comments pertaining to sex."<sup>105</sup> In 1976, the plaintiff began work at James River Corporation as a machinist.<sup>106</sup>

Soon after the plaintiff began work, several fellow employees asked the plaintiff why he had no wife or girlfriend and referred to the plaintiff's supervisor as the plaintiff's "daddy."<sup>107</sup> The second comment was made because the plaintiff's supervisor, like the plaintiff, was Polish.<sup>108</sup> The plaintiff reported this incident to his night supervisor.<sup>109</sup> The plaintiff's night supervisor responded by using "daddy" to describe the plaintiff's supervisor.<sup>110</sup> In 1978, the night supervisor told the plaintiff that if the plaintiff could not fix a machine the plaintiff would be sent to a polish sausage factory.<sup>111</sup> The night supervisor also told the plaintiff that the plaintiff needed to "get married and get some of that soft pink smelly stuff that's between

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<sup>100</sup> See *id.* at 451-52.

<sup>101</sup> *Id.*

<sup>102</sup> 697 F. Supp. 1452 (N.D. Ill. 1988).

<sup>103</sup> See *id.* at 1453.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See *id.*

<sup>107</sup> See *Goluszek*, 697 F. Supp. at 1453.

<sup>108</sup> See *id.*

<sup>109</sup> See *id.*

<sup>110</sup> See *id.*

<sup>111</sup> See *id.*

the legs of a woman.”<sup>112</sup>

In 1979, certain employees told the plaintiff that he should get married and that he should go out with another employee because she “fucks.”<sup>113</sup> The plaintiff reported this to the night supervisor whose response was that if the plaintiff did not fix the machine they would get the female employee to fix the plaintiff.<sup>114</sup> Later that year, a number of employees on numerous occasions threatened to knock the plaintiff off his ladder with their jeeps.<sup>115</sup> The plaintiff reported these incidents but nothing was done.<sup>116</sup> In fact, the plaintiff’s employer told him that his employee antagonism was the type of misuse of company time that could get the plaintiff fired.<sup>117</sup> In 1981, the plaintiff was transferred back to the night shift.<sup>118</sup> On that shift, the other employees constantly asked the plaintiff if he had gotten any “pussy” or had oral sex, showed him pictures of nude women, told him they would get him “fucked,” accused him of being gay or bisexual, and made other sex-related comments.<sup>119</sup> On one occasion, an employee poked the plaintiff in the buttocks with a stick.<sup>120</sup> The plaintiff complained to the General Foreman about the incidents but nothing was done.<sup>121</sup>

After several more complaints from the plaintiff, the plaintiff was terminated for misuse of company time.<sup>122</sup> Following the plaintiff’s termination, the plaintiff brought an action against his employer for sexual harassment and national-origin discrimination.<sup>123</sup> The court in *Goluszek* based its reasoning on its interpretation of the congressional intent behind Title VII.<sup>124</sup> The court held that Congress was concerned about discrimination stemming from an imbalance of

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<sup>112</sup> *Goluszek*, 697 F. Supp. at 1453.

<sup>113</sup> *See id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

<sup>116</sup> *See id.* at 1453-54.

<sup>117</sup> *See Goluszek*, 697 F. Supp. at 1453-54.

<sup>118</sup> *See id.*

<sup>119</sup> *See id.*

<sup>120</sup> *See id.* at 1454.

<sup>121</sup> *See id.*

<sup>122</sup> *See Goluszek*, 697 F. Supp. at 1455.

<sup>123</sup> *See id.*

<sup>124</sup> *See id.* at 1456.

power and an abuse of that imbalance by the powerful, which results in discrimination against a discrete and vulnerable group.<sup>125</sup> The court reasoned that since the plaintiff was a male in a male-dominated environment, the plaintiff could not show that he worked in an environment where males were treated as inferior.<sup>126</sup>

The *Goluszek* Court went even further by saying that the environment that the plaintiff worked in was actually anti-female instead of anti-male.<sup>127</sup> The court's anti-female argument is not very persuasive. For instance, one of the plaintiff's female co-workers filed a complaint for one off-color comment made to her by an employee, and the employee who made the comment was quickly reprimanded with a written notice of possible termination for any future reported incidents.<sup>128</sup> While the facts presented to the *Goluszek* Court described only one form of male-on-male harassment, other courts in addition to the Fifth Circuit have either approved or relied upon the reasoning in *Goluszek* to find all manifestations of male-on-male sexual harassment—including a gay supervisor's harassment of a male subordinate—not to be actionable under Title VII.<sup>129</sup>

The court in *Goluszek* was correct in that there has been a historic imbalance of power between men and women in the workplace, and this history does offer a persuasive argument that the sexual harassment of a woman by a male supervisor or co-worker should be understood as sex discrimination.<sup>130</sup> However, this historical fact does not mean that men who are sexually harassed by other men are excluded from the protection that Title VII offers. Title VII does not attempt to limit who may bring suit based on the sex of either the person harassing or the person being harassed.<sup>131</sup>

As for the congressional intent announced in *Goluszek*, this comment has already noted that the legislative history behind Title VII suggests that legislators could have had very little preconceived notion of what types of sexual discrimination would be encompassed by Title VII during the enactment.<sup>132</sup> Sex was included in the list of prohibited grounds of discrimination by a congressional opponent at the last moment in the hopes that it would dissuade his colleagues from

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<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See *Goluszek*, 697 F. Supp. at 1456.

<sup>128</sup> See *id.* at 1455.

<sup>129</sup> See *Doe v. Belleville*, 119 F.3d 563, 572 (7<sup>th</sup> Cir. 1997).

<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986).



approving the bill.<sup>133</sup> Therefore, it is only reasonable that Congress had nothing more than the traditional idea of “man” and “woman” in mind when voting to outlaw sex discrimination. Clearly, discrimination based on sexual orientation and transsexualism did not fall within the boundaries of Title VII.<sup>134</sup>

*B. Sexual Orientation as a Necessary Element Under Title VII*

The idea that the harasser’s sexual orientation is relevant stems from the assumption that sexual harassment is a function of the harasser’s sexual attraction to the person harassed.<sup>135</sup> This assumption is the explanation that a number of courts have given for emphasizing sexual orientation in same-sex sexual harassment claims. The Fourth Circuit has followed this line of thought. While the Fourth Circuit has recognized the viability of same-sex harassment claims, it held in *McWilliams v. Fairfax County Bd. of Supervisors* that the homosexuality of the plaintiff and/or his harassers is a necessary element of the harassment claim that must be pleaded and proved.<sup>136</sup>

In 1987, the Newington Facility of Fairfax County Equipment Management Transportation Agency (“EMTA”) hired the plaintiff as an automotive mechanic.<sup>137</sup> McWilliams informed the facility that he had a learning disability that severely affected his cognitive and emotional development.<sup>138</sup> Beginning in 1989, McWilliams’ co-workers beset him with a variety of offensive activities.<sup>139</sup> The employees teased McWilliams about his sexual activities and exposed themselves to McWilliams.<sup>140</sup> They taunted him with remarks such as, “[t]he only woman you could get is one who is deaf, dumb, and blind.”<sup>141</sup> During one incident, a coworker who sometimes took on supervisory responsibilities put a condom in McWilliam’s food.<sup>142</sup> There were also several physical incidents.<sup>143</sup> On

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<sup>133</sup> See *Doe*, 119 F.3d at 572.

<sup>134</sup> See *id.*

<sup>135</sup> See *id.* (citing *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 752 (4<sup>th</sup> Cir. 1996); *Martin v. Norfolk Southern Ry. Co.*, 926 F. Supp. 1044, 1049-50 (N.D. Ala. 1996)).

<sup>136</sup> See *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1197 (4<sup>th</sup> Cir. 1996).

<sup>137</sup> See *id.* at 1194.

<sup>138</sup> See *id.* at 1193.

<sup>139</sup> See *id.*

<sup>140</sup> See *id.*

<sup>141</sup> *McWilliams*, 72 F.3d at 1193.

<sup>142</sup> See *id.*

at least three occasions, co-workers tied McWilliams' hands together, blindfolded him, and forced him to his knees.<sup>144</sup> On one of these occasions, a co-worker placed his finger in McWilliams' mouth to simulate an oral sex act.<sup>145</sup> During another of these incidents, a co-worker placed a broomstick to McWilliams' anus while a third person exposed his genitals to McWilliams.<sup>146</sup> On yet another occasion, an employee entered the bus on which McWilliams was working and fondled McWilliams' penis until it became erect.<sup>147</sup> The environment at EMTA was heavily focused on sex.<sup>148</sup> Copies of *Playboy* magazine and a variety of pornographic materials were displayed in the bathrooms.<sup>149</sup> Centerfold pictures were placed in and around mechanics' toolboxes.<sup>150</sup> The radio was often turned to talk shows that featured explicit sexual topics.<sup>151</sup>

On three occasions, McWilliams complained about these matters to his supervisors; however, nothing was done to rectify the situation.<sup>152</sup> In August of 1992, McWilliams was diagnosed with severe emotional problems, which caused him to leave his employment in September 1992 on medical leave. On October 13, 1993, McWilliams brought an action in federal court against his employer claiming sex discrimination in violation of Title VII.<sup>153</sup> The Fourth Circuit held in a divided opinion that the district court had properly entered summary judgment against McWilliams on his claim because McWilliams and his alleged harassers were males, and no claim was made that any were homosexual.<sup>154</sup> The majority explained that its ruling was driven by a common sense reading of the important causation language contained in the statute, "because of the [claimant's] sex."<sup>155</sup> The Fourth

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<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

<sup>145</sup> See *id.*

<sup>146</sup> See *McWilliams*, 72 F.3d at 1193.

<sup>147</sup> See *id.* at 1199.

<sup>148</sup> See *id.* at 1193.

<sup>149</sup> See *id.*

<sup>150</sup> See *id.* at 1194.

<sup>151</sup> See *McWilliams*, 72 F.3d at 1194.

<sup>152</sup> See *id.* at 1194.

<sup>153</sup> See *id.*

<sup>154</sup> See *id.* at 1195.

<sup>155</sup> *Id.*

Circuit reasoned that “as a purely semantic matter, we do not believe that in common understanding the kind of shameful heterosexual-male-on heterosexual-male conduct alleged [by McWilliams] (nor comparable female-on-female conduct) is considered to be ‘because of the [target’s] sex.’”<sup>156</sup> The court ruled that the actions were likely predicated upon McWilliams’ prudery, shyness, or other form of vulnerability to sexually focused speech or conduct, but not “because of” the victim’s sex.<sup>157</sup>

In *Hopkins v. Baltimore Gas & Elec. Co.*,<sup>158</sup> Judge Niemeyer, a member of the majority in *McWilliams*, elaborated on why he believed proof of the harasser’s sexual orientation is necessary in a claim of same-sex harassment.<sup>159</sup> “When someone sexually harasses an individual of the opposite gender a presumption arises that the harassment is ‘because of’ the victim’s gender.”<sup>160</sup> He explained that the presumption is based on the reality that sexual conduct directed by a man towards a woman usually occurs because the target is female and the same conduct would not have been directed toward another male.<sup>161</sup> However, explained Judge Niemeyer, when the harasser and the victim are of the same sex, the presumption is exactly the opposite because such sexually suggestive conduct is usually motivated by entirely different reasons.<sup>162</sup> Therefore, Judge Niemeyer concluded that when a male employee attempts to prove that another male has sexually harassed him, he carries the burden of proving that the harassment was directed against him “because of” his sex.<sup>163</sup> The primary way this burden may be met is with proof that the harasser acted out of sexual attraction to the employee.<sup>164</sup>

Finally, in *Wrightson v. Pizza Hut of America*,<sup>165</sup> the Fourth Circuit answered the threshold question that it had avoided in *McWilliams* and *Hopkins*—whether same-sex harassment is, in fact, actionable under Title VII. In *Wrightson*, the plaintiff, a sixteen year old heterosexual male, was employed at Pizza Hut as a

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<sup>156</sup> *McWilliams*, 72 F.3d at 1196.

<sup>157</sup> *See id.*

<sup>158</sup> 77 F.3d 745 (4<sup>th</sup> Cir. 1996).

<sup>159</sup> *See id.* at 752.

<sup>160</sup> *Id.*

<sup>161</sup> *See id.*

<sup>162</sup> *See id.*

<sup>163</sup> *See Hopkins*, 77 F.3d at 752.

<sup>164</sup> *See id.*

<sup>165</sup> 99 F.3d 138 (4<sup>th</sup> Cir. 1996).

cook and waiter.<sup>166</sup> During that time, the plaintiff's supervisor and five of the plaintiff's co-workers were openly homosexual males.<sup>167</sup> A few months after the plaintiff began work at Pizza Hut, the supervisor and the homosexual male employees began harassing the plaintiff and the plaintiff's heterosexual co-workers.<sup>168</sup> The harassment included conduct where the plaintiff's supervisor graphically described homosexual sex to the plaintiff in an attempt to persuade the plaintiff into engaging in homosexual sex.<sup>169</sup> The plaintiff's supervisor repeatedly touched the plaintiff in sexually provocative ways.<sup>170</sup> On several occasions, the supervisor ran his hands through the plaintiff's hair, massaged the plaintiff's shoulders, purposely rubbed his genital area against the plaintiff's buttocks while walking past him, squeezed the plaintiff's buttocks, and pulled out the plaintiff's pants in order to see down into them.<sup>171</sup> When touching the plaintiff, his supervisor often made sexually explicit comment describing homosexual acts.<sup>172</sup>

The harassment proceeded during working hours on a daily basis for seven months, in the presence of and with the knowledge of upper management.<sup>173</sup> On August 15, 1995, the plaintiff filed an action against Pizza Hut in the United States District Court for the Western District of North Carolina, alleging that he had been sexually discriminated against in violation of Title VII.<sup>174</sup> The district court held that no Title VII cause of action lies where the perpetrator of the sexual harassment and the target of the harassment are of the same sex.<sup>175</sup> In reversing the District Court's opinion, the Fourth Circuit explained that, since the language of Title VII did not rule out same-sex harassment claims, a same-sex hostile work environment sexual harassment claim may lie under Title VII where a homosexual male (or female) employer discriminates against an employee of the same sex or permits such discrimination against an employee by homosexual employees of the same sex.<sup>176</sup>

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<sup>166</sup> See *id.* at 139.

<sup>167</sup> See *id.*

<sup>168</sup> See *id.*

<sup>169</sup> See *id.*

<sup>170</sup> See *Wrightson*, 99 F.3d at 140.

<sup>171</sup> See *id.*

<sup>172</sup> See *id.*

<sup>173</sup> See *id.* at 139.

<sup>174</sup> See *id.* at 141.

<sup>175</sup> See *Wrightson*, 99 F.3d at 140.

<sup>176</sup> See *id.* at 143.

Thus, according to the Fourth Circuit, a heterosexual man who sexually harasses a woman discriminates in violation of Title VII; the heterosexual man has no motivation to sexually harass a male because he is sexually uninterested in men.<sup>177</sup> This focus on the sexual orientation of the harasser illustrates a fundamental misconception that sexual harassment is necessarily connected to sexual desire.

C. *Sexual Desire is not Required to Bring a Claim Under Title VII*

While it is true that lust is the driving force behind many harassers, no court has held that the harasser must have been sexually interested in the victim in order to bring a successful claim for sexual harassment under Title VII.<sup>178</sup> In many cases it has been enough that any other reasonable woman would find the same harassment degrading and abusive. It is the pervasive sexual content of the harassment that has been the only proof required to establish that the plaintiff has been sexually harassed, and therefore, she was discriminated against because of her sex.<sup>179</sup> The idea that harassment is only actionable under Title VII when it can be attributed to the harasser's sexual desire for the victim is reminiscent of the now unapproved idea that rape is a sexual act, rather than an act of violence.<sup>180</sup> The Eighth Circuit made this point clear in *Quick v. Donaldson Co., Inc.*<sup>181</sup>

In January 1991, Donaldson hired Phil Quick as a welder and press operator in its muffler production plant.<sup>182</sup> Quick alleged that at least twelve males "bagged him" on some 100 occasions from January 1991 through December 1992.<sup>183</sup> "Bagging" is defined as an action aimed at the man's groin area.<sup>184</sup> According to Quick, bagging involved the intentional grabbing and squeezing of a man's testicles.<sup>185</sup> Quick's supervisor testified that bagging was widespread and involved a feinting motion towards a man's testicles that was meant to startle the

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<sup>177</sup> See *Doe v. Belleville*, 119 F.3d 563, 585 (7<sup>th</sup> Cir. 1997).

<sup>178</sup> See *id.* at 587 n.22.

<sup>179</sup> See generally *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372 (8<sup>th</sup> Cir. 1996).

<sup>180</sup> See *id.*

<sup>181</sup> See *id.*

<sup>182</sup> See *id.* at 1374.

<sup>183</sup> See *id.*

<sup>184</sup> See *Quick*, 90 F.3d at 1374.

<sup>185</sup> See *id.*

man.<sup>186</sup> The supervisor also admitted that he had bagged others.<sup>187</sup> The plant manager said that he had warned Quick when Quick was hired that he might be bagged.<sup>188</sup>

In August 1991, Quick complained to his supervisor about the bagging incidents, but the supervisor failed to take any remedial action.<sup>189</sup> Quick also claimed that on one occasions one worker held Quick's arms while another grabbed and squeezed Quick's testicle, producing swelling and bruising.<sup>190</sup> In addition to the bagging, Quick claimed that he was verbally harassed and falsely labeled a homosexual.<sup>191</sup> Quick's co-workers placed tags on Quick's forklift and belt loop, which referred to a sexual act with a cucumber and stated "Pocket Lizard Licker" and "Gay and Proud."<sup>192</sup> In December 1992, one of Quick's co-workers wrote "queer" on Quick's work identification card.<sup>193</sup> Quick reported this to his new supervisor; however, no action was taken.<sup>194</sup>

As a result of the harassment, Quick obtained medical and psychological treatment.<sup>195</sup> Quick has a permanent continued throbbing sensation in his left testicle due to the alleged assault and battery.<sup>196</sup> In August 1993, Quick filed a charge of discrimination with the Iowa Civil Rights Commission, as well as a state tort action against his supervisors.<sup>197</sup> Quick amended his complaint in January 1994, in order to add two counts of sexual discrimination in violation of Title VII.<sup>198</sup> The District Court entered summary judgment against Quick on his Title VII claim, reasoning that the abuse, although involving Quick's genitals, was not actually sexual in nature: "Bagging did not happen because male DCI co-workers were

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<sup>186</sup> *See id.*

<sup>187</sup> *See id.*

<sup>188</sup> *See id.*

<sup>189</sup> *See Quick*, 90 F.3d at 1375.

<sup>190</sup> *See id.*

<sup>191</sup> *See id.*

<sup>192</sup> *Id.*

<sup>193</sup> *See id.*

<sup>194</sup> *See Quick*, 90 F.3d at 1375.

<sup>195</sup> *See id.*

<sup>196</sup> *See id.*

<sup>197</sup> *See id.*

<sup>198</sup> *See id.*

demanding sexual favors, were expressing sexual interest, or making sexual comments regarding Quick's gender."<sup>199</sup> The Court of Appeals reversed the District Court's opinion:

A worker need not be propositioned, touched offensively, or harassed by sexual innuendo in order to have been sexually harassed . . . . Intimidation and hostility may occur without explicit sexual advances or acts of an explicitly sexual nature. Moreover, physical aggression, violence, or verbal abuse may amount to sexual harassment. The bagging was aimed at Quick's sexual organs, his testicles were squeezed so hard on one occasion that he almost passed out from the pain, he was punched in the neck and he was verbally taunted with names such as "queer" and "pocket lizard licker."<sup>200</sup>

It is probably true that society has always taken it for granted that opposite-sex harassment was induced by the heterosexual harasser's sexual orientation toward the opposite sex. However, to instill that assumption in legal doctrine would have dramatic negative implication for claims of opposite-sex and same-sex harassment alike.<sup>201</sup>

For instance, if courts formally presume that a male harasser is heterosexual and harasses the female "because of" her gender, then is that presumption rebuttable? Would her harasser be able to avoid liability by proving that he is gay? Taking this line of reasoning further, would an employer be able to avoid liability by proving that the harasser was motivated to torment the plaintiff and not because of her sex?<sup>202</sup> According to *McWilliams*, motives unrelated to sex would defeat not only claims of same-sex harassment but claims of opposite-sex harassment as well.<sup>203</sup> In addition, what result would have occurred if the harasser proved that he is bisexual?<sup>204</sup> Would he have incurred no liability because he does not discriminate, for he is sexually attracted toward both sexes and both men and women might fall prey to sexual harassment in the form of sexual advances?<sup>205</sup>

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<sup>199</sup> *Quick*, 90 F.3d at 1375.

<sup>200</sup> *Id.* at 1379.

<sup>201</sup> *See Doe v. Belleville*, 119 F.3d 563, 588 (7<sup>th</sup> Cir. 1997).

<sup>202</sup> *See id.*

<sup>203</sup> *See id.*

<sup>204</sup> *See id.* at 589.

<sup>205</sup> *See id.*

Without the decision in *Oncale*, courts could have been led down a path of horrifying discovery issues. Deciding whether a harasser is gay, straight, bisexual, or something else would have been an impossible task for a judge. Friends and family members of the harasser would have been hauled into court for every case in order to testify as to the sexuality of the harasser. Also, many people who are heterosexual have had one or more homosexual experiences in their lives, although they do not consider themselves gay, and likewise many gay individuals have had heterosexual experiences.<sup>206</sup> In addition, while many gays and lesbians have experienced significant increases in societal acceptance in the past few years, there are still many homosexual individuals who remain in the closet.<sup>207</sup>

### V. THE DECISION

In order to explore the decision in *Willis*, it is necessary to examine its U. S. Supreme Court predecessor *Oncale v. Sundowners Offshore Service*.<sup>208</sup> In *Oncale*, the plaintiff was employed by Sundowner Offshore Services on a Chevron U.S.A., Inc., oil platform in the Gulf of Mexico.<sup>209</sup> The plaintiff was a roustabout on an eight-man crew.<sup>210</sup> On several occasions, the plaintiff was forcibly exposed to sex-related embarrassing actions by his supervisor and his co-workers.<sup>211</sup> During one incident, the plaintiff's supervisor sexually assaulted the plaintiff and threatened the plaintiff with rape.<sup>212</sup>

The plaintiff complained of the incidents to supervisory personnel, but no action was ever taken.<sup>213</sup> In fact, one of the supervisory personnel informed the plaintiff that the plaintiff's direct supervisor had harassed him too.<sup>214</sup> Eventually, the plaintiff quit his job at Sundowners.<sup>215</sup> The plaintiff testified in his deposition that he felt that if he did not quit, he would be raped.<sup>216</sup> The plaintiff brought suit

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<sup>206</sup> See *Doe*, 119 F.3d at 589.

<sup>207</sup> See *id.*

<sup>208</sup> 118 S. Ct. 998 (1998).

<sup>209</sup> See *id.* at 1000.

<sup>210</sup> See *id.* at 1001.

<sup>211</sup> See *id.* at 1000-01.

<sup>212</sup> See *id.* at 1001.

<sup>213</sup> See *Oncale*, 118 S. Ct. at 1001

<sup>214</sup> See *id.*

<sup>215</sup> See *id.*

<sup>216</sup> See *id.*



against Sundowner in the United States District Court for the Eastern District of Louisiana, claiming that he was discriminated against in his employment because of his sex.<sup>217</sup> Relying on the Fifth Circuit decision in *Garcia*, the district court held that the plaintiff has no cause of action under Title VII because he was a male claiming harassment by another male.<sup>218</sup> The plaintiff appealed this decision, but the Fifth Circuit held that *Garcia* was binding Circuit precedent.<sup>219</sup>

The Supreme Court granted certiorari and Justice Scalia delivered the unanimous opinion of the Court. Justice Scalia began the opinion by quoting the relevant section of Title VII and the holdings in *Meritor* and *Harris*.<sup>220</sup> The Court further discussed Title VII's history by reiterating the holding in *Newport News*: "Title VII's prohibition of discrimination because of . . . sex protects men as well as women."<sup>221</sup> Writing for the Court, Justice Scalia then presented the "bewildering variety of stances" that state and federal courts have taken in the context of same-sex sexual harassment.<sup>222</sup> The Court was shocked by the holdings of many of the opinions in same-sex harassment cases.<sup>223</sup> In fact, the Court saw no reasonable justification in the statutory language or Supreme Court precedent for holdings that exclude same-sex harassment claims from the coverage of Title VII.<sup>224</sup> The Court conceded that male-on-male sexual harassment was not the evil that Congress was trying to eliminate when it enacted Title VII.<sup>225</sup> However, according to Justice Scalia, statutory prohibitions are meant to go beyond the discrete principal evil and protect against reasonably equivalent evils.<sup>226</sup> Justice Scalia stated that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."<sup>227</sup>

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<sup>217</sup> See *id.*

<sup>218</sup> See *Oncale*, 118 S. Ct. at 1001.

<sup>219</sup> See *id.*

<sup>220</sup> See *id.* (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 1002.

<sup>223</sup> See *Oncale*, 118 S. Ct. at 1002.

<sup>224</sup> See *id.*

<sup>225</sup> See *id.*

<sup>226</sup> See *id.*

<sup>227</sup> *Id.*

The Court absolutely rejected the argument that recognizing same-sex harassment would transform Title VII into a general civility code for the American workplace by reasoning that the risk to Title VII is no greater for same-sex than for opposite-sex harassment.<sup>228</sup> Workplace harassment, even harassment between men and women, is not automatically discrimination “because of” sex merely because the words used have sexual content or connotations.<sup>229</sup> “The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>230</sup> The Court further reasoned that courts and juries have easily inferred discrimination in most male-female sexual harassment contexts because the complained of conduct usually involves explicit or implicit proposals of sexual activity.<sup>231</sup> It is reasonable to assume those proposals would not have been made to someone of the same sex. Likewise, this inference would be available to a plaintiff claiming same-sex harassment, so long as there was credible evidence that the harasser was homosexual.<sup>232</sup> However, the Court was quick to caution the courts, such as the Fourth Circuit, that harassing conduct does not have to be motivated by sexual desire to support an inference of discrimination on the basis of sex.<sup>233</sup>

The Court added that there is an additional requirement that prevents Title VII from expanding into a general civility code:

As we emphasized in *Meritor* and *Harris*, the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the “condition” of the victim’s employment.<sup>234</sup>

In addition, the Court has always regarded the above requirement as necessary because it is crucial to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or

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<sup>228</sup> See *Oncale*, 118 S. Ct. at 1002.

<sup>229</sup> See *id.*

<sup>230</sup> *Id.* (quoting *Harris*, 510 U.S. at 25).

<sup>231</sup> See *id.* at 1002.

<sup>232</sup> See *id.*

<sup>233</sup> See *Oncale*, 118 S. Ct. at 1002.

<sup>234</sup> *Id.* at 1002-03.

intersexual flirtation—for discriminatory “conditions of employment.”<sup>235</sup>

The Court also emphasized that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering “all the circumstances.”<sup>236</sup> Common sense and an appropriate sensitivity to social situations will allow courts and juries to distinguish between simple teasing and horseplay among members of the same sex and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.<sup>237</sup> Justice Thomas concurred in reversing the Fifth Circuit’s opinion, stating that the Court emphasizes that the plaintiff must plead and ultimately prove Title VII’s statutory requirement that there be discrimination “because of . . . sex.”<sup>238</sup>

#### A. *A Recognized Cause of Action Under the West Virginia Human Rights Act*

After reviewing the facts of the case, the Supreme Court of Appeals in *Willis* began its opinion by recognizing that the U. S. Supreme Court recently addressed the actionability of a same-sex sexual harassment claim in *Oncale*.<sup>239</sup> The *Willis* Court quoted *Oncale* throughout the opinion, emphasizing Justice Scalia’s statement that, “if our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination because of . . . sex merely because the plaintiff and defendant are of the same sex.”<sup>240</sup> The *Willis* Court then explained that, when interpreting provisions of the West Virginia Human Rights Act, the court would look to federal discrimination law dealing with Title VII.<sup>241</sup> Thus, the *Willis* Court followed the Supreme Court decision in holding that discrimination based upon same-sex sexual harassment is a recognized cause of action under the West Virginia Human Rights Act.<sup>242</sup>

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<sup>235</sup> *Id.* at 1003.

<sup>236</sup> *Id.* (quoting *Harris*, 510 U.S. at 23).

<sup>237</sup> *See id.* at 1003.

<sup>238</sup> *Oncale*, 118 S. Ct. at 1003 (Thomas, J., concurring).

<sup>239</sup> *See Willis v. Wal-Mart Stores, Inc.*, 504 S.E.2d 648, 649 (W. Va. 1998).

<sup>240</sup> *Id.* at 651 (quoting *Oncale*, 118 S. Ct. at 1001-02).

<sup>241</sup> *See id.* (citing *West Virginia Human Rights Comm’n v. Wilson Estates*, 503 S.E.2d 6 (W. Va. 1998)).

<sup>242</sup> *See id.* at 652.

B. *Elements of Same-Sex Sexual Harassment Under the West Virginia Human Rights Act*

The second part of the certified question required the Court to determine the elements of a claim for same-sex harassment.<sup>243</sup> The *Willis* Court began its analysis of this question by identifying the elements of an opposite-sex harassment claim set forth in *Hanlon v. Chambers*.<sup>244</sup> *Hanlon* identified the elements necessary to establish a claim for sexual harassment under the West Virginia Human Rights Act based upon a hostile or abusive work environment as (1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and (4) it was imputable on some factual basis to the employer.<sup>245</sup> The *Willis* Court recognized that the Fourth Circuit in *Wrightson* and *McWilliams* upheld the notion that same-sex harassment claims are actionable only if the harasser is homosexual; however, the *Willis* Court explained that the decision in *Oncale* rejected this notion outright.<sup>246</sup> The *Willis* Court then held that the elements for a same-sex sexual harassment claim remain the same as those that were pronounced in *Hanlon*.<sup>247</sup>

However, the *Willis* Court, citing *Tietgen v. Brown's Westminster Motors, Inc.*, did concede that same-sex harassment claims would be more difficult to prove.<sup>248</sup> In *Tietgen*, the defendant hired the plaintiff in April 1994.<sup>249</sup> Another man was hired one month later to act as the plaintiff's manager.<sup>250</sup> Soon after the manager was hired, he began making sexual remarks to the plaintiff, which included solicitation for sexual favors.<sup>251</sup> When the plaintiff rejected his manager's offers, the manager began subjecting the plaintiff to a campaign of ridicule, intimidation, humiliation, and harassment at work.<sup>252</sup> The plaintiff complained

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<sup>243</sup> See *id.*

<sup>244</sup> 464 S.E.2d 741 (W. Va. 1995).

<sup>245</sup> See *Willis*, 504 S.E.2d at 652 (citing *Hanlon*, 464 S.E.2d at 741).

<sup>246</sup> See *id.* at 653 (citing *Oncale*, 118 S. Ct. at 1002).

<sup>247</sup> See *id.* at 653.

<sup>248</sup> See *id.* (citing *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495 (E.D. Va. 1996)).

<sup>249</sup> See *Tietgen*, 921 F. Supp. at 1496.

<sup>250</sup> See *id.* at 1496-97.

<sup>251</sup> See *id.* at 1497.

<sup>252</sup> See *id.*

about the manager's behavior at least three times to the general manager, but the general manager took no action.<sup>253</sup> By early August 1994, the manager's harassing behavior became "uncontrollable and bizarre."<sup>254</sup> Therefore, the plaintiff requested a transfer to another related dealership, and the transfer was approved.<sup>255</sup> However, one week later, the new dealership told the plaintiff that "because of what they had heard about [the plaintiff's] complaints at Brown's Mitsubishi, Brown's Mitsubishi/Brown's Pontiac was terminating him."<sup>256</sup>

On November 9, 1994, the plaintiff filed a charge of discrimination with the Fairfax County Human Rights Commission.<sup>257</sup> The charge alleged that the plaintiff's manager solicited sexual intercourse from the plaintiff and that the plaintiff complained to his supervisor's about the harassment but that no corrective action was taken.<sup>258</sup> The court in *Tietgen* explained that causation is less apparent in same-sex sexual harassment cases than in those involving individuals of the opposite sex because, simply put, society as a whole has more experience with heterosexual relationships and heterosexual interaction.<sup>259</sup> The *Tietgen* Court held that despite this disadvantage, the plaintiff must ultimately prove the causation element as part of his Title VII *prima facie* case.<sup>260</sup> If the plaintiff cannot prove that he was harassed because of his sex, as opposed to some other reason, his claim fails.<sup>261</sup> Realizing that plaintiffs would have a problem with causation, the court in *Willis*, as did the Supreme Court in *Oncale*, decided that when proof of a sexual harasser's homosexuality is available and is credible, such evidence is relevant to the issue of same-sex sexual harassment.<sup>262</sup> The *Willis* Court added that lack of such evidence would not render a plaintiff unable to prove a *prima facie* case of sexual harassment; however, the lack of such evidence would his/her case more difficult to prove.<sup>263</sup>

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<sup>253</sup> See *id.*

<sup>254</sup> *Tietgen*, 921 F. Supp. at 1497.

<sup>255</sup> See *id.*

<sup>256</sup> *Id.*

<sup>257</sup> See *id.*

<sup>258</sup> See *id.*

<sup>259</sup> See *Tietgen*, 921 F. Supp. at 1501.

<sup>260</sup> See *id.*

<sup>261</sup> See *id.*

<sup>262</sup> See *Willis v. Wal-Mart Stores, Inc.*, 504 S.E.2d 648, 653 (W. Va. 1998).

<sup>263</sup> See *id.*

Additionally, *Willis* stressed, as did *Oncale*, that permitting same-sex sexual harassment cases would not flood the judicial system with civil actions involving teasing and horseplay.<sup>264</sup> *Willis* borrowed reasoning from the Seventh Circuit when observing that similar concerns were expressed when courts rejected the first claims of sexual harassment brought by women in the 1970s:

Here we are, twenty years later, and the sky has not fallen. We are not, it turns out, incapable of distinguishing between the occasional off-color joke, stray remark, or rebuffed proposition, and a work environment that is rendered hostile by severe or pervasive harassment. We are well practiced in examining sexual harassment from the objective viewpoint of the reasonable individual as well as the subjective view of the plaintiff. When a man complains that another man has sexually harassed him, then, we know how to distinguish between harassment and "horseplay"; we have been making that very distinction for years in the cases that female plaintiffs have brought.<sup>265</sup>

However, *Willis* does seem to take its own stand, apart from *Oncale*, by using the standard mentioned in *Doe v. Belleville* to distinguish between mere annoying horseplay and sexual harassment causing a hostile work environment.<sup>266</sup> *Willis* explains that common sense will enable us to distinguish between occasional, undirected vulgarity that would not tend to make the workplace hostile to any man or woman and a campaign of harassment that emphasizes an individual's sex, uses his gender to humiliate and intimidate him, and renders the work environment hostile to him because he is a man.<sup>267</sup>

## VI. THE IMPLICATIONS OF *WILLIS*

It is probably true that recognizing a cause of action for same-sex sexual harassment will increase litigation in the context of sexual harassment. However, the standard that the West Virginia Supreme Court of Appeals adopted in *Willis* to show a hostile workplace environment is narrower than that previously set forth in *Hanlon*.<sup>268</sup> While the *Willis* Court affirmed the elements pronounced in *Hanlon* to

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<sup>264</sup> See *id.*

<sup>265</sup> *Id.* at 653-54 (quoting *Doe v. Belleville*, 119 F.3d 563, 591-92 (7<sup>th</sup> Cir. 1997)).

<sup>266</sup> See *id.* at 654.

<sup>267</sup> See *Willis*, 504 S.E.2d at 654 (citing *Doe*, 119 F.3d at 591-92).

<sup>268</sup> See *Hanlon v. Chambers*, 464 S.E.2d 741 (W. Va. 1995).

establish a claim for sexual harassment, the language that *Willis* adopted from *Doe* requires a “campaign of harassment” to show a hostile work environment.<sup>269</sup> This analysis does not appear congruent with the Supreme Court’s requirement to evaluate the harassment from the perspective of a reasonable person in the plaintiff’s position, considering all the relevant circumstances.<sup>270</sup> Under this balancing test set up by the Supreme Court, a single incident can create a hostile environment if it is severe enough, while a number of arguably objectionable actions may not.<sup>271</sup> Normally it takes more than one isolated incident of sexually offensive conduct to create a hostile workplace environment.<sup>272</sup> Abusive environments consist of multiple incidents of unwelcome sexual harassment. Yet, the requirement for repeated exposure to harassment will vary inversely with the severity of the offensiveness of the incidents.<sup>273</sup> For instance, *Faragher* held that a single severe incident can amount to discriminatory changes in the “terms and conditions of employment.”<sup>274</sup> By requiring a “campaign of harassment,” the West Virginia Supreme Court of Appeals has dispensed with the mandated balancing test and instituted a quantitative analysis.

The courts in *Willis* and *Oncale* vehemently stressed that recognizing a claim for same-sex sexual harassment will not turn the West Virginia Human Rights Act and Title VII into a general civility code.<sup>275</sup> In doing so, the courts specifically rejected the notion that the workplace requires asexuality and androgyny.<sup>276</sup> The courts went further to say that intersexual flirtation and roughhousing among members of the same sex would not cross the line of sexual harassment.<sup>277</sup> However, the *Oncale* and *Willis* decisions use terms such as “ordinary socializing” and “normal flirtation.”<sup>278</sup> Surely it will not be long before the courts are presented with the question of whether a homosexual male/female may flirt with a heterosexual male/female in the workplace and be given the same

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<sup>269</sup> *Willis*, 504 S.E.2d at 653.

<sup>270</sup> *See Oncale v. Sundowners Offshore Service*, 118 S. Ct. 998, 1003 (1998).

<sup>271</sup> *See Baskerville v. Culligan International Co.*, 50 F.3d 428, 431 (7<sup>th</sup> Cir. 1995).

<sup>272</sup> *See Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp.2d 870, 881 (N.D. Ind.1998).

<sup>273</sup> *See id.*

<sup>274</sup> *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283 (1998).

<sup>275</sup> *See Willis*, 504 S.E.2d at 653 (relying on *Oncale*, 118 S.Ct. at 1002).

<sup>276</sup> *See Oncale*, 118 S. Ct. at 1003.

<sup>277</sup> *See id.*

<sup>278</sup> *Id.*

latitude as a male flirting with a woman or vice versa. Remember that the standard has both subjective and objective elements. Would the reasonable heterosexual male consider his workplace environment hostile if his homosexual male co-workers were flirting with him daily, even if the homosexual co-workers have not crossed the “ordinary socializing” line drawn for his female co-workers? Moreover, will what would be considered normal male-on-male horseplay and teasing still be normal when it is a homosexual male touching and teasing his heterosexual male co-worker? The courts seem to dismiss the above questions by reasoning that common sense will be the guide.<sup>279</sup> However, the Seventh Circuit has admitted that same-sex harassment was not what was in the mind of the legislature when enacting Title VII and that society has more experience with and can better understand heterosexual behavior.<sup>280</sup>

## VII. CONCLUSION

With the *Willis* decision, the West Virginia Supreme Court of Appeals announced equality between the sexes under the West Virginia Human Rights Act: the *Willis* Court recognized a claim for same-sex sexual harassment under the West Virginia Human Rights Act.<sup>281</sup> Moreover, the *Willis* decision announced that the elements to establish a claim of same-sex harassment would be identical to the elements required to establish an opposite-sex harassment claim.<sup>282</sup> With the adoption of this rule, West Virginia leads the way in conforming to the recent Supreme Court opinion in *Oncale*. However, the *Willis* Court did narrow the scope of harassment claims by holding that a plaintiff must show a campaign of harassment to establish a claim of hostile environment sexual harassment.<sup>283</sup> Whether the decision precludes plaintiffs from successfully establishing a claim for a single severe incident remains to be seen. Moreover, it is questionable whether homosexuals will be given the same latitude for social interaction in the workplace as is given heterosexuals.

The decision in *Willis* indicates that the Supreme Court of Appeals of West Virginia is eager to support equality between the sexes for protection under the West Virginia Human Rights Act. This holding will encourage harassment victims of both sexes to appeal undesirable results to the West Virginia Supreme Court of Appeals. However, plaintiffs should be aware that the Supreme Court of Appeals

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<sup>279</sup> See *id.*

<sup>280</sup> See *Doe v. Belleville*, 119 F.3d 563, 589 (7<sup>th</sup> Cir. 1997).

<sup>281</sup> See *Willis*, 504 S.E.2d at 648.

<sup>282</sup> See *id.* at 653.

<sup>283</sup> See *id.*



stressed that this ruling will not make the Human Rights Act a general civility code.<sup>284</sup> Therefore, only behavior that a reasonable person in the plaintiff's position would find as objectionable will trigger protection under the Act. The *Willis* decision does not answer all questions concerning sexual harassment, but it tries to establish the proposition that men and women will be treated equally when bringing harassment claims in West Virginia.

*Rochelle L. Brightwell\**

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<sup>284</sup> See *id.*

\* I would like to thank my mother for always being there when I needed her the most.